THE UNIFORM PARTNERSHIP ACT AND LEGAL PERSONS

IN a recent number of the HARVARD LAW REVIEW there was published a criticism of the Uniform Partnership Act which has been approved by the Conference on Uniform State Laws and recommended to state legislatures for adoption.[1] Mr. William Draper Lewis, the draftsman of the proposed Act, replied to the criticism by an article published in the December, 1915, and January, 1916, numbers of the REVIEW.[2] Although unable to find in the article to which he replies a statement of reasons for the contention that the Act should be framed on the legal-person theory of partnership,[3] Mr. Lewis states at some length his reasons for believing it should not be framed on that theory,[4] and asserts that it was not framed on that theory but is inconsistent therewith.[5] The editors of the REVIEW have kindly allowed the writer to supplement his former article by a more explicit statement of the considerations which favor the adoption of the legal-person theory as the basis of a codification of the law of partnership and a reply to the objections urged by Mr. Lewis.

The views expressed by Mr. Lewis regarding legal personality[6] are difficult to understand for two reasons: First, he confuses entities in general with entities which are capable of legal personality. His definition of entity as "phenomena grouped in the mind as possessing a common attribute not had by other phenomena"[7] may very well answer the purposes of philosophy, but is of little assistance in dealing with the problem of whether an alleged entity is such an entity as is capable of legal personality. It is submitted that an entity is capable of legal personality, *i. e.*, of being recognized and treated by the law as a legal person, if it has objective

[1] "The Uniform Partnership Act — a Criticism," 28 HARV. L. REV. 762.

[2] "The Uniform Partnership Act — a Reply to Mr. Crane's Criticism," 29 HARV. L. REV. 158, 291.

[3] 29 HARV. L. REV. 158.

[4] 29 HARV. L. REV. 162–92.

[5] 29 HARV. L. REV. 291–96.

[6] 29 HARV. L. REV. 159–62.

[7] 29 HARV. L. REV. 161.

reality, interests such as the law protects, and power to will and to act. A group of human beings is such an entity. A business or group of activities is not. Second, he regards human personality as the only true legal personality and all other legal personality as fictitious.[8] A legal person is an entity treated by the law as the subject of rights and obligations. Human beings constitute the numerically largest class of legal persons and have a wider range of interests and powers than other legal persons, such as the state, the city, the university, the business corporation. But not all human beings are legal persons, nor are all legal persons human beings.[9]

Mr. Lewis admits that the partnership is an entity,[10] and apparently does not deny that it is capable of being treated as a legal person. The issue is whether it should be so treated in a codification of the law of partnership.

A. The Legal Person Theory should be Adopted as the Basis of Codification

1. In any one jurisdiction the body of the law of partnership contains many rules and doctrines which are inconsistent with each other. As between the several common law jurisdictions there are an extraordinary number of conflicting decisions. The lack of unity, coherence and uniformity is largely due to the fact that the law of partnership has been built upon a patchwork foundation consisting of elements drawn from the law merchant, from equity and from the common law, whose special contributions have been joint estates and joint obligations. The Act attempts to remedy the situation by introducing a new element, "tenure in partnership." [11] The most effective way to make the law of partnership logical, scientific and uniform is to abandon the old premises and substitute one from which a body of law can be deduced with ease and certainty. The only adequate premise is the theory that the partnership is a legal person.

[8] 29 Harv. L. Rev. 161–62.

[9] A slave is a human being, but has at times been denied all legal personality. That the personality of associations as separate from the personality of the associates individually is a fact not a fiction, is demonstrated in an article by Mr. Harold J. Laski, "The Personality of Associations," 29 Harv. L. Rev. 404.

[10] 29 Harv. L. Rev. 162.

[11] Uniform Partnership Act, § 25.

2. The certainty and ease with which the details of the law could be developed under the legal-person theory would immensely shorten the labors of the judge, lawyer, student and business man.

3. Many important problems would receive solutions more nearly approximating current ideas of justice and business convenience than is now possible. For example, the questions regarding the rights of a partner and his separate creditors in partnership property,[12] the right of an insolvent partnership to dispose of its property,[13] and the right of a partner to enter into a contract with the partnership valid and enforceable at law before dissolution.

4. The practical superiority of the legal-person theory is demonstrated by the fact that civil law countries have adopted it.[14]

5. Although the common law is said not to recognize the partnership as a legal person, many courts have expressly declared it to be such and based their decisions upon the theory that it is to be regarded as a legal person.[15]

---

[12] This matter is dealt with in the Act by instituting a "tenure in partnership," the incidents of which are substantially the same as the legal consequences of recognizing the partnership as a legal person as the owner of the partnership property. The Act thus impliedly adopts the legal-person theory. See 28 HARV. L. REV. 771–73. In one instance the Act probably goes beyond the legal-person theory in protecting the partnership from the act of a partner. Suppose the firm of A. and B. owns land standing on the record in the names of A. and B., no partnership relation being disclosed. A. purports to convey to C., a *bonâ fide* purchaser, his half interest as tenant in common. C. would get a good title under existing law, and also under the legal-person theory, as A. and B. would be considered trustees for the partnership. Under § 25 (*b*) apparently the *bonâ fide* purchaser for value would get nothing, the conveyance not being authorized by the partnership.

[13] The Act makes no provision for this situation. See 28 HARV. L. REV. 774.

[14] 28 HARV. L. REV. 764.

[15] Some of these cases are cited in a note, 28 HARV. L. REV. 766, n. 37. That they support the proposition for which they are cited follows from Mr. Lewis's admission that "the courts in deciding the cases, in whole or in part, base their conclusion on the legal-person theory." 29 HARV. L. REV. 175. But he denies their value as tending to prove the desirability of adopting the legal-person theory as the basis of codification on the ground that the cases on analysis "fall into two classes: first, those in which the same conclusion as that arrived at by the court can also be reached under the aggregate theory as set forth in the provisions of the Uniform Act; and second, those in which the conclusion, due solely to the conscious adoption of the legal-person theory, is inequitable and unjust." The fact that the Uniform Act contains provisions under which the first group of cases would be decided the same way as they have been decided by courts which have based their decisions on the legal-person theory proves the Act to have adopted, to a certain extent at least, the legal-person theory.

The other cases, which Mr. Lewis characterizes as "unjust and inequitable," apparently consist of two out of the sixteen cited in the note — Clay, Robinson & Co. *v.* Doug-

6. Many decisions of cases involving questions of partnership law are irreconcilable with any other than the legal-person theory, although that theory is not expressly referred to as the basis of the decisions.[16]

las County, 88 Neb. 363, 129 N. W. 548 (1911), and Curtis *v.* Hollingshead, 2 Green (N. J. L.) 402 (1834). In the former case the question was whether the tax law of Nebraska rendered taxable at its place of business the credits of a partnership, the members of which were non-residents. The court held the property taxable under the statutes on the ground that the partnership is an entity distinct and separate from its members recognized by the law as a person which had acquired a domicile in the state, and that its course of business "however much it might protect a natural person, in our judgment presents no obstacle in the instant case to the enforcement of the taxing laws of this state." Mr. Lewis regards this "intimation" in the passage quoted that a non-resident natural person might escape taxation under the circumstances which would render a partnership taxable as an arbitrary and unjust result. It is to be observed (1) the alleged injustice is a distinction between a foreign partnership and a foreign natural person as the subject of taxation under the Nebraska statutes, (2) from the context the distinction seems to be one suggested by counsel rather than by the court, (3) the distinction is at most a *dictum* unnecessary to the decision of the case, (4) the distinction results from the provisions of the statute as construed by the court and not solely from the regarding of a partnership as a legal person.

Curtis *v.* Hollingshead, *ubi supra*, is also a case of statutory construction. The point decided is that under the New Jersey attachment law a firm creditor cannot sue out an attachment against one of a firm who has absconded, the other members remaining in the state. Mr. Lewis objects to an injustice in the possibility of a distinction between this situation and that of an absconding joint debtor not a partner. It is to be observed (1) that the court does not sanction such a distinction, but on the contrary asserts the same rule applies to both cases (pages 407, 408), and (2) if any such distinction existed it would be due to the statute and not solely to the court's treating the firm as a legal person.

While it is submitted that in neither case is there any inequitable and unjust result due solely to the adoption of the legal-person theory, it is not denied that such results are possible in some situations. But as in the case of corporation law injustice can be avoided by statutory provision and by the court of equity doing what in corporation law has been called "disregarding the fiction."

[16] These cases are referred to in part in 28 HARV. L. REV. 767–68. Mr. Lewis sees in these cases "no more than illustrations of the obvious fact that the activities of the partners as associated in partnership form a group of activities separate from their other activities." 29 HARV. L. REV. 191. He discusses the cases under nine headings, which will be followed in replying to his comments.

First. "A creditor holding a security given by a partner individually is not treated as a secured creditor for the purpose of proving against the insolvent estate of the firm." Mr. Lewis's explanation of this rule is that "each class of the partners' creditors, the partnership and separate creditors, have priority on the joint and separate assets respectively; and therefore the partnership creditor does not take any of the property out of which he or his fellow partnership creditors are claiming dividends when he uses the security which he has received from the separate estate of the partner." 29 HARV. L. REV. 182. The explanation is inadequate for two reasons: (1) The insolvency and bankruptcy acts involved in the cases cited define a secured creditor as

7. There is considerable legislation, aside from attempts to codify the law of partnership, which treats the partnership as a legal person by making it the subject of rights and obligations.[17]

[17] 28 HARV. L. REV. 768, 769. These statutes Mr. Lewis disposes of as he does the cases referred to in the preceding note, as "illustrations of the fact that partners as associated in partnership carry on a group of activities which are separated from their other activities." 29 HARV. L. REV. 192. It might be said that the stockholders of a corporation or the citizens of a municipality are merely carrying on through the corporation activities separate from their other activities. It would be far easier to understand Mr. Lewis's discussion if he would define "legal personality" and furnish a test by which one may distinguish between (*a*) treating the partnership as distinguished from the partners as the subject of rights and obligations, and so treating it as a legal person, and (*b*) giving legal effect to the separateness of groups of activities for the purpose of enforcing rights and obligations.

one having security out of "property of the debtor" (*In re* Levin Bros.' Estate, 139 Cal. 350, 73 Pac. 159 (1903)) or "property of the bankrupt" (*In re* Thomas, 8 Biss. 139 (1878)); and not as Mr. Lewis takes it to mean "property of the bankrupt as to which no other class of creditors has a priority." (2) In accordance with Mr. Lewis's explanation the creditor would be treated as a secured creditor if the separate estate were sufficient to pay the separate creditors, so that the partnership creditors having a right to the surplus would be injured by the retention of the security. Yet in both the leading cases, *In re* Thomas, *ubi supra*, and *In re* Levin, *ubi supra*, though the separate creditors had been paid, the partnership creditor was allowed to keep the security and was not treated as a secured creditor. It is of interest to note that the dissenting opinion of McFarland, J., in the Levin case proceeds on the ground that the "partnership is really not a legal entity. It is not a person. . . ." It was evidently clear to the mind of this member of the court that the decision was inconsistent with the aggregate theory of partnership.

Second. "Joint creditors of all the partners on obligations not arising out of partnership transactions cannot prove against the joint estate." Mr. Lewis's explanation of this rule is that the courts "follow the partners themselves in keeping their joint assets devoted to each particular business distinct." 29 HARV. L. REV. 183. It is submitted that the origin of the rule of administration of insolvent estates which gives the partnership creditors priority as against the partnership assets is due to a determination, perhaps not clearly formulated, to follow the mercantile practice of treating the partnership as a legal person. It is a right conferred upon the creditors by law. That the debtor or debtors should by their unilateral act or mere intent give to certain creditors a potential priority is a novel idea. A creditor does not get a lien as to part of his debtor's general assets simply because the debtor would like to have it so. An explanation more in accordance with generally accepted legal principles is that expressed in the leading American authority for the rule under discussion, Forsyth *v.* Woods, 11 Wall. (U. S.) 484 (1870), that the partnership is "a distinct thing from the partners themselves." Bearing this phrase in mind, Mr. Lewis's suggestion that the courts "have apparently looked at the facts as they are," 29 HARV. L. REV. 183, seems singularly apt.

Third. "When a firm signs a note as co-makers with an individual the liability of the firm is that of one person for purposes of contribution." Mr. Lewis would prefer to state the result of the cases cited to the effect that "for the purpose of contribution the liability of the firm is no greater than the liability of the individual." 29 HARV.

8. The language and the effect of provisions of the proposed Uniform Act are more nearly consistent with the legal-person theory of partnership than with any other theory.[18]

[18] 28 HARV. L. REV. 769–74. Mr. Lewis appears to admit that in substance the provisions of the Act referred to are consistent with the legal-person theory, particularly that § 25 gives the partnership all the rights in partnership property as against the partner which it would have under the legal-person theory. But he argues that the Act should not be regarded as consistent with the legal-person theory because had the draftsman desired to adopt the legal-person theory his form of statement would have been different, though he would have reached the same result as regards the rights of a partner in partnership property. 29 HARV. L. REV. 293. Probably a court inclined to favor a legal-person theory as the basis for solution of a problem not dealt with by the Act would look rather to the substance than to the form of the provisions of the Act in deciding whether the Act is inconsistent with the legal-person theory. Referring to the obligation of a partner to *indemnify the partnership* and to consequences of a *fraud upon the partnership*, 29 HARV. L. REV. 295, Mr. Lewis maintains that one can owe oneself a legal duty and inflict upon oneself a legal injury, conceptions which are hard to reconcile with generally accepted legal principles. See cases cited under note 16, "Fifth," to the effect that one cannot be a party on both sides of a joint obligation.

L. REV. 184. The writer only attempted to paraphrase the language of the opinion in the leading case cited, *viz.*, "the firm of J. & C. T. McCune were to be considered as one person, one party." Hosmer *v.* Burke, 26 Ia. 353, 358 (1868). The court reached the result by treating the firm as one person, as it expressly declares. No doubt in so doing they are carrying out the apparent intention of the parties, which is Mr. Lewis's justification for the result.

Fourth. "A bill bearing the names of two firms engaged in two distinct activities, but composed of the same members, is signed by two persons." The case thus summarized, Second National Bank *v.* Burt, 93 N. Y., 233 (1883), involves the interpretation of a bank's by-law to the effect that "To entitle any paper to be discounted there must be two names of responsible persons liable upon the same . . . the name of a firm being considered as one person." It was held that a cashier was justified in taking paper drawn by one firm upon another composed of the same members. Mr. Lewis says the result follows necessarily from the wording of the by-law. 29 HARV. L. REV. 184. But it is submitted that there is a question as to the meaning of the word "firm." If it mean the aggregate of its members, there is here but one firm and but one person under the by-law unless "name of a firm" is given the forced meaning "each and every name of a single firm." But if the same group of persons in forming a firm have created an entity separate and distinct from themselves in the aggregate, they may form two or more such firms, which will be different firms, and the result of the instant case naturally follows.

Fifth. The cases grouped under this head all involve the validity of a contract between a firm and one of its members or between two firms having a common member. The writer submits that the validity of such contract is inconsistent with treating the firm otherwise than as a legal person. Mr. Lewis asserts that such a contract is not immoral, that the fact that one is interested on both sides does not render it illegal, and sees no objection to its validity though the firm be regarded as an aggregate. 29 HARV. L. REV. 185–88. No one has claimed that a contract between A. on the one side and A. and B. on the other is immoral or that A.'s merely being *interested* on both sides makes it illegal. But the rule of law which seems to have escaped the notice of

The above considerations indicate the desirability of treating the partnership as a legal person and the fact that the tendency of

---

Mr. Lewis is that one person cannot be both a party obligor and a party obligee to a joint contract. Ellis *v.* Kerr, [1910] 1 Ch. 529; Boyce *v.* Edbrooke, [1903] 1 Ch. 836; Eastern Tube Co. *v.* Harrison, 140 Fed. 519, 524 (1905), *semble;* Cecil *v.* Laughlin, 4 B. Mon. (Ky.) (1843) 30; Eastman *v.* Wright, 6 Pick. (Mass.) 320 (1828). Such a contract between a firm and a partner has, consistently with the aggregate theory, been held invalid. De Tastet *v.* Shaw, 1 B. & Al. 664 (1818), and similarly a contract between two firms having a common member. Bosanquet *v.* Wray, 6 Taunt. 597 (1816). In an early American case, Wilby *v.* Phinney, 15 Mass. 116 (1818), the surviving partner of one firm was allowed to recover in assumpsit against the administrator of the deceased partner on an obligation due from another firm of which the defendant's intestate was a member. The language of the court, at page 123, in referring to proof in insolvency between the estates of two firms having a common member, to the effect that "In such cases they seem to be treated in some respects as constituting corporations, the two co-partnerships being considered as distinct, although one person be a common partner in both," is worthy of note as an early recognition of the legal-person theory. Cases which hold valid a contract between a partnership and a partner or another partnership having a common partner are irreconcilable with the aggregate theory of partnership and are supportable only if the partnership be recognized as having a legal personality separate from that of the partners.

Sixth. "A deposit by a partner with bankers of collateral as security for any sum in which he may become indebted does not authorize its application to a partnership debt." Mr. Lewis observes that "the question is each case should depend on the intent of the parties to the transaction." In the leading American case, Bank of Buffalo *v.* Thompson, 121 N. Y. 280, 282, 24 N. E. 473 (1890), the court holds that "a fair construction of the language" of the written agreement between the borrower and the bank "shows that it was intended to secure such obligations and such only" (*i. e.*, the individual obligations and not the partnership obligations). In construing a written contract the court adhered to the mercantile usage, of which it took judicial notice, of treating the partnership as a legal person separate from the partners. See Meehan *v.* Valentine, 145 U. S. 611, 622 (1891), in which the United States Supreme Court refers to Bank of Buffalo *v.* Thompson in similar terms. The court is none the less treating the partnership as a separate legal person because in so doing it is carrying out the intention of the parties. On the other hand, it is not a repudiation of the legal-person theory to receive evidence of a contrary intention of the parties and give effect to it, as in Hallowell *v.* Blackstone Nat. Bank, 154 Mass. 359, 28 N. E. 281 (1891).

Seventh and Eighth. In the cases classified under these heads it was submitted that a partnership was treated as a legal person in certain bankruptcy cases. Mr. Lewis maintains that recognition of the fact that activities of partners connected with the partnership are separate from their outside activities does not involve the assumption that the partnership forms a distinct legal person, and "recognition that there are two distinct businesses, one run by A. and B., and the other by A., B. and C. — is a recognition of a patent fact, which . . . does not involve the necessity of saying that each business is conducted by a legal personality." 29 HARV. L. REV. 189. While a business is an entity it is not such an entity as can be treated as a legal person. Only the individual or group which carries on the business can be treated as a legal person. To impose on a group carrying on a business obligations payable primarily only out of the assets of that business is to make of the group entity a distinct subject of rights and

common law jurisdictions is toward the result already achieved in the civil law.

B. Answer to Objections to the Legal Person Theory as the Basis of Codification

1. The reasons which induced the change from the legal-person theory first adopted by the commissioners are set forth by Mr. Lewis under three main heads, the first of which is the realization that to base the Act on the legal-person theory "was not to express in statutory form the law of partnership which has grown up in our courts, but in effect to abolish much of our existing partnership law and substitute in its place radically different legal principles." [19] This conservative objection is raised against all efforts toward legal reform. It was raised against the changes introduced by other Uniform Acts, such as the full negotiability of the warehouse receipt and bill of lading.[20] The weight of the objection depends upon the extent to which the law would be changed by basing the act on the legal-person theory and the advantages and disadvantages of the necessary changes.

A large part of the body of the law of partnership would be unaffected by the adoption of the legal-person theory. As to those problems the solution of which is affected by treating the partnership as a legal person or otherwise, it is submitted that courts have not invariably applied the aggregate theory, but, as has been shown in many instances, consciously or unconsciously applied the legal-person theory. The principal changes which would follow the uniform and thorough adoption of the legal-person theory pertain to rights of the partner and of his separate creditors in partnership

[19] 29 Harv. L. Rev. 172.

[20] Uniform Bills of Lading Act, § 31; Uniform Warehouse Receipts Act, § 40; Burdick, "A Revival of Codification," 10 Col. L. Rev. 118.

obligations which is treating it as a legal person. The writer disagrees with Mr. Lewis's statement that the priority against partnership assets which is given to partnership creditors does not involve the assumption that the partnership is to that extent treated as a legal person. 29 Harv. L. Rev. 190.

Ninth. "A sheriff seizing firm property on an execution against a partner is subject to an action of trespass by the firm." Mr. Lewis contends that cases to this effect do not necessarily involve the legal-person theory because the same result would be reached under the "tenure in partnership" theory of the Act. 29 Harv. L. Rev. 191. The writer's inference from this fact is that the Act has here again partially adopted the legal-person theory.

property, rights of an insolvent partnership to apply partnership property to purposes other than payment of partnership debts, and the validity and method of enforcement of contracts and other obligations between a partnership and partner or other partnership having a common member. That the draftsman does not regard as objectionable the changes in respect to these matters which would follow the adoption of the legal-person theory may be inferred from the fact that the Act embodies under the guise of incidents of the newly instituted "tenure in partnership" [21] the principal legal consequences as regards rights of a partner and his separate creditors in partnership property which would exist under the legal-person theory; that the restrictions which the legal-person theory would impose on the power of an insolvent partnership to dispose of its assets were embodied in the section on Fraudulent Conveyances which appeared in former drafts prior to the eighth and was rejected because it was thought the matter belonged in another department of law; [22] and that Mr. Lewis sees no objection to the validity of a contract between a partnership and one of its members and none but a technical procedural difficulty in the way of its enforcement by the original parties.[23] It would appear that the conservative objection to change of existing law is given undue weight, which is rather surprising in view of the introduction by the Act of a radically new legal institution, "tenure in partnership."

2. The second cause or group of causes for the rejection of the legal-person theory is "the perception that the legal-person theory not only rests on the fiction of group personality but also on an assumption that business men in dealing with a partnership do not consider themselves as dealing directly with the partners, an assumption which is directly contrary to the fact; together with the perception that there were unforeseen practical difficulties in working out under that theory the rights of partnership creditors." [24]

To say that group personality is a fiction is ambiguous. The legal personality of a group, *i. e.*, its recognition by the law as subject of rights and obligations, can hardly be regarded as fictitious in view of the conspicuous legal position of the state, the municipal, business and other corporations, which are only groups of human beings treated as subject of rights and obligations and so made legal

[21] Uniform Partnership Act, § 25. See note 12.
[22] 29 HARV. L. REV. 297.
[23] 29 HARV. L. REV. 186.
[24] 29 HARV. L. REV. 172.

persons. That a group has the same kind of human personality as a man is of course a fiction. But it is submitted that a group of men has a group personality, interests and a power to will and to act, that this is a fact, not a fiction.[25]

Whether business men consider themselves as dealing with the partnership as an entity or with the partners as an aggregate is a matter as to which one hesitates to generalize without considerable experience and observation. It appears to be the opinion of those who have expressed themselves on this matter, with the exception of Mr. Lewis, that business men regard the firm as an entity.[26] This opinion is so widely held that the legal-person theory of partnership is often called the "mercantile theory." It is no doubt true that persons dealing with a partnership expect the partnership obligation to be supported by the personal contributory liability of the partners, but such liability is not inconsistent with the legal-person theory.

One of the two practical difficulties involved in the application of the legal-person theory, according to Mr. Lewis,[27] is that of providing the partnership creditor with a satisfactory method of enforcing the obligation of the partner to contribute to the payment of partnership obligations. This is a problem of procedural rather than of substantive law. It was decided not to include in the Act any provisions regarding procedure, but the commissioners are said to have been advised to reject the legal-person theory because its adoption would raise some difficulties in a department of law outside the province of the Act as it has been defined. Under existing law in most jurisdictions a partnership creditor can bring suit against the partnership and attach separate property of a partner where attachment is allowed. Having recovered judgment he can levy execution on the property of those members of the firm who have been served with process or otherwise personally brought within the jurisdiction of the court. But unless the firm is insolvent the creditor seldom needs to take out execution. If the firm is insolvent the property of the partners is likely to be administered by a court of bankruptcy, and under the bankruptcy law an attachment or

[25] Laski, "The Personality of Associations," 29 HARV. L. REV. 404.

[26] GILMORE ON PARTNERSHIP, 114; 1 LINDLEY ON PARTNERSHIP (Am. ed.), § 206; Hallowell *v.* Blackstone Nat. Bank, 154 Mass. 359, 363, 28 N. E. 281 (1891); Bank of Buffalo *v.* Thompson, 121 N. Y. 280, 282, 24 N. E. 473 (1890).

[27] 29 HARV. L. REV. 166.

levy on a judgment obtained within four months prior to bankruptcy is avoided and the separate property applied to the payment of the separate creditors, the balance going into the general partnership estate. The situation is therefore that the personal liability of the partner and the right to levy on his separate property is of value to the partnership creditor only in the exceptional event of a partner's staying out of bankruptcy more than four months after a partnership creditor has obtained judgment which is followed by execution. Apparently Mr. Lewis believes that it is impossible to treat the partnership as a legal person and at the same time give the partnership creditor an equally satisfactory remedy against the partner and his separate property. It is submitted that Dean Ames' proposal to allow joining of the partner as co-defendant under the name of *contributor*, with attachment of his property where attachment is allowed, can be developed into as satisfactory a remedy as exists at present.[28] It may seem anomalous as a matter of form to join as co-defendant in an action at law one who is not a party to the obligation, but that is a familiar occurrence in actions of trustee process or garnishment, and practically the same situation exists where suit against the partnership is allowed after service on less than all of the partners,[29] and where the partnership may be sued in the partnership name.[30] In the light of experience under such procedure it should not be difficult to devise a method whereby under the legal-person theory the remedy of the creditor against the partner and his separate estate would be as valuable to him as is his present remedy.

---

[28] Second Draft, § 12. "Each Partner Answerable for Firm Liabilities. Claims against a partnership shall be satisfied in the first instance, so far as possible, out of the firm assets. If after the exhaustion of the firm assets the judgment against the firm remains unsatisfied in whole or in part, the firm creditor may enforce the joint and several liabilities of the partners as contributories to the firm, to make good any deficiency of the firm assets. If the plaintiff may lawfully attach the property of the firm before judgment against it the plaintiff may also attach before such judgment the property of any one or more of the partners joined as contributories as a security for the payment of his or their contributory liability."

[29] Blythe *v.* Cordingly, 20 Colo. App. 508, 80 Pac. 495 (1905); First Nat. Bank *v.* Greig, 43 Fla. 412, 31 So. 239 (1901); Staiger *v.* Theiss, 19 Misc. 170, 43 N. Y. Supp. 292 (1897); Heaton *v.* Schaeffer, 34 Okla. 631, 126 Pac. 797 (1912); Pope Mfg. Co. *v.* Welch, 55 S. Car. 528, 33 S. E. 787 (1899); State *v.* Cloudt, 11 Tex. Ct. Rep. 932, 84 S. W. 415 (1904).

[30] Anderson *v.* Wilson, 142 Iowa 158, 120 N. W. 677 (1909); Fritche *v.* Liddell & Co., 6 Oh. Dec. 971 (1880).

The other practical difficulty, at one time referred to by Mr. Lewis as "the most serious practical difficulty" [31] but later as "another, though minor difficulty," [32] is the matter of registration. At one time Mr. Lewis declares that "as Mr. Ames admitted, it necessitates the creation of a system for the registration of all partnerships, and a provision that no partnership can exist until it is registered," [33] and later, more mildly, he refers to the "necessity, or rather great desirability, under that theory, of some efficient system for the registration of all partnerships." [34] The writer has been informed by Professor Brannan, who has taught partnership in the Harvard Law School for a number of years, that Dean Ames in numerous conversations regarding his drafts of the Partnership Act never said or even intimated that he thought there was any necessity for registration under the legal-person theory — but since a large number of states had requirements of registration of varying terms he concluded that a Uniform Act should contain a provision making uniform the requirements for registration, and so inserted such a provision in his drafts.[35] It is to be noted that the only penalty proposed by Dean Ames for failure to register was the one imposed by the majority of existing statutes, — incapacity to sue until the requirements should be satisfied. The only reason advanced by Mr. Lewis for regarding registration as even desirable is that if the partnership be treated as a legal person suit against it must be brought in the partnership name, and if the name is registered it will be easier for the public to learn exactly what it is.[36] But on this ground desirability of registration is far greater in the present situation at common law, under which suit must be brought against all the partners. It is more difficult to learn the names of all the partners than it is to learn the name under which a partnership does business. The desirability of registration is no greater under the legal-person theory than under the aggregate theory.

3. The third cause for rejecting the legal-person theory is the belief "that the worst of the existing difficulties and confusions in our partnership law — the rights of partners in specific partnership property — could be overcome by getting rid of the idea that part-

[31] Lewis, "The Uniform Partnership Act," 24 YALE L. J. 617, 641.
[32] 29 HARV. L. REV. 167.
[33] See note 31.
[34] 29 HARV. L. REV. 167.
[35] First Draft, § 6; Second Draft, § 5.
[36] See note 34.

ners hold partnership property as joint tenants with modifications and giving to the co-ownership incidents which fit in with the objects leading men to form partnerships." [37] This supposedly means that "tenure in partnership," with its incidents as set forth in Section 25, embodies all the desirable consequences of the legal-person theory. But there remain the difficulties and confusions caused by attempts of the insolvent partnership to apply its assets otherwise than in the payment of its debts, which would be largely cleared away by the legal-person theory but are left untouched by the proposed Act. The Act is to be commended for its partial adoption of the legal-person theory, but because it does not avowedly and thoroughly adopt that theory it leaves open many questions of partnership law which will continue to receive different answers in different jurisdictions.

Certainty, uniformity and detailed rules which accord with business convenience and popular ideas of justice will never be gained in this important branch of commercial law, in the writer's opinion, without the adoption of the legal-person theory as the basis of codification. It therefore seems regrettable that the commissioners were induced to rescind the instructions to the draftsman that the Act be based on the legal-person theory. Their decision would seem less open to criticism if they had been able to secure and act in the light of expressions of opinion from a larger number of critics than have been consulted. It is respectfully submitted that someone who believed in the legal-person theory should have been asked to submit a draft based on that theory and attempt to meet the objections urged by those favoring the draft now adopted. It is the writer's hope that the advantages of the legal-person theory may in time be so widely understood and appreciated that there will be an effective demand for a Uniform Act based on that theory.

Judson A. Crane.

GEORGE WASHINGTON UNIVERSITY LAW SCHOOL.

[37] 29 HARV. L. REV. 172.